United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1878

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P/S

To be argued by
LAWRENCE STERN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

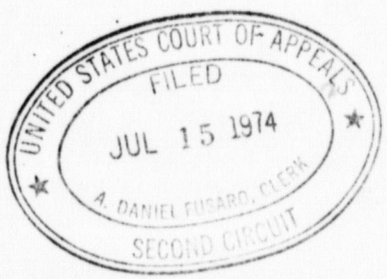
IRWIN LAYNE et.al.,

Defendants-Appellant.

Docket No. 74-1878

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT LAYNE



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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

Appellee,

-against-

IRWIN LAYNE et. al.,

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Docket No. 74-1878

ISSUES PRESENTED

1. Whether the Government has demeaned the criminal process and deprived Appellant of due process of law by offering as its chief witness at trial, vouching for his credibility, and arguing justification for his prior perjuries, the government informant who, while under contract with the Government, masterminded the scheme charged against Appellant, used his government contract to further that scheme, and who admitted suborning perjury to the SEC, bribing judges and policemen, and committing numerous stock swindles and income tax evasion.

2. Whether because the Court charged general knowledge and intent were sufficient for conviction of membership in a conspiracy to commit mail fraud and to use the mails in the fraudulent sale and purchase of securities, the conviction must be reversed.

3. Whether Appellant was denied a fair trial when he was forced to defend against both the Government and an accusing co-defendant who was being tried on a separate count of perjury, and when he was tried on an indictment charging him with being a "promoter and finder."

4. Whether Appellant was entitled to full disclosure of all electronic surveillance conducted on Appellant in relation to this case, the defendants on trial, and the government witnesses.

STATEMENT PURSUANT TO RULE 28(a)(3)

A. Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York [Metzner,J.] rendered on June 14, 1974, convicting Appellant of the crimes of conspiracy (18 U.S.C. §371), use of deceptive devices in the mails in connection with the purchase and sale of securities [15U.S.C. §§ 78j(b), 78ff and 18 U.S.C. §2], and three counts of mail fraud [18 U.S.C. §§1341, 2], and sentencing him to one year imprisonment on the conspiracy (to commence December 1, 1974, without benefit of the special 4208 parole provision included in a previous four year sentence presently being served by Appellant), and a suspended sentence on the other charges.

Timely notice of appeal was filed, and Edward S. Panzer, assigned trial counsel, has continued as assigned counsel on appeal.

B. Statement of Facts

Appellant was tried together with Theodore Koss, William McGee and Stephen Hagler on an indictment filed September 25, 1973, charging sixteen defendants with conspiracy, and securities and mail fraud in connection with the sale and purchase of a common stock, Automated Information Systems (hereinafter referred to as AIS). As finally presented to the jury, the indictment named Appellant an indicted co-conspirator in Count 1, and described him as, "at all times material to this Indictment, a self-employed promoter and finder." Appellant was not named in the second Count, which charged Theodore Koss

and others with fraud in the offer and sale of the stock under 15 U.S.C. § 77q. Count 3 charged Appellant and his co-defendants, among others, with the employment of manipulative devices through the mails, in the purchase and sale of AIS, specifically the sending of a confirmation of purchase of 500 shares of AIS to Bernard Weber on May 3, 1971. Appellant was not named in Count 4, which charged Theodore Koss with failing to deposit proceeds from the AIS underwriting in an escrow account, under 15 U.S.C. 78o (c)(2). Counts 5, 8, and 11 charged Appellant and his co-defendants on trial with mail fraud in the sending of confirmations of purchase of AIS to Jackie Mason on April 21, 1971, to K. Chapin on June 4, 1971, and to H. Zankel on June 11, 1971, respectively. Counts 6, 7, 9, and 10 were dismissed by the Court on consent of the government at the close of their case (1616*), and Counts 5 and 8 were also dismissed at that time as to defendants McGee and Hagler (1642). Appellant was not named in Count 13, which charged Theodore Koss with submitting false documents to the SEC.

Prior to trial Appellant moved for a severance, asserting that the included trial of the perjury counts 12 and 13 against Theodore Koss alone, when this crime was not alleged to be part of the conspiracy charged against Appellant, would be collateral and prejudicial to the issues surrounding a fair adjudication of Appellant's guilt. Appellant also moved

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*Numbered references are to pages in the transcript of the trial.

to strike the superfluous and prejudicial characterization of him in the indictment as, "at all times material to this indictment, a self employed promoter and finder." Appellant also moved prior to trial for the disclosure of any electronic or wire-tap surveillance directly or indirectly involved in the procurring of the government's evidence in this case. All these motions were denied, except as to Count 12, a perjury count against Theodore Koss, which the Court severed. Originally, the Court had severed both perjury counts, 12 and 13, stating in an opinion dated March 12, 1974:

> I conclude that in a multi-defendant case, in which all of the defendants are charged with engaging in joint criminal activity, prejudice will undoubtedly flow to the fifteen defendants not named in the perjury counts. By reason of the joint charges and proof, it is likely that the perjury counts would adversely 'rub off' on the remaining defendants. A similar result was reached by Judge Murphy in United States v. Re, 62 Cr. 307 (Unreported Opinion, August 10, 1962), which was a seven-defendant securities fraud case where three defendants were charged with making false declarations. See also, United States v. Re, 336 F. 2d 306, 308, n.1 (2d Cir., 1964). Finally, I see no undue hardship to the government at this time. If a conviction of Koss is obtained in the first trial, it may decide not to proceed with the trial on the perjury counts. Similarly, if an acquittal is found, the basis for the perjury counts is weakened and again, there may be no second trial. The motion to sever counts twelve and thirteen is granted.
>
> (slip opinion at pp. 13-14)
> (See Appendix for full opinion)

On March 29, on government motion for reconsideration, the Court partially reversed itself and restored Count 13 to the

charges on trial.

The Trial.

The major government witness was Michael C. Hellerman. Hellerman testified that in December, 1970, an associate of his, Murray Taylor, proposed to Hellerman and another associate, Murray Levine, that they take on the underwriting of a common stock, Automated Information Systems. Hellerman told Taylor he would do it only if Theodore Koss, the official underwriter of the stock at that time, would give Hellerman a "box in the stock" by selling into Hellerman's control, the 15,000 shares of the 65,000 share offering that Koss had already sold. Hellerman also demanded 50% of the proceeds of the offering, which was a Reg A, all or nothing offering to be completed by early March, 1971 (125-127).

At a second meeting sometime shortly after Hellerman's return from a cruise on the Queen Elizabeth II on February 13, 1971, Levine told Hellerman that Koss had agreed to sell the 15,000 shares to Hellerman at $1.50/share, and that Stephen Zardus (Interstate Equity) had been included as official co-underwriter on the offering circular for the AIS stock. Levine said he'd personally guarantee Koss' turnover of the 15,000 shares; Hellerman told Levine that any stock sold by Koss into the market would be deducted from profits owing Levine. With that, Hellerman began to "sell" the stock, conducting all the operations in Murray Taylor's name, and having no personal dealing with Koss. (128-132)

> I didn't want to meet Teddy Koss because
> I was trying to stay out of the deal and

> put Taylor in the limelight so I wouldn't get in any more trouble with the United States Attorney's office.
>
> (243)
>
> Well, because of my first agreement with the government, I introduced customers that were going to buy the stock to Murray Taylor and I tried to blame the deal - I tried to make believe it was Murray Taylor's deal, not mine...
>
> (132)

Hellerman testified further that 17,000 shares were sold in the names of people that were known to Hellerman, and that 28,000 shares were sold to people whose names were pulled from the telephone book; the money for the telephone book shares was paid to the co-underwriter, Zardus, by Hellerman himself, $22,000 in cash and $6,000 in two checks drawn in Murray Taylor's name, covered in cash from Hellerman to Taylor (133-135, 145-148). Thus, the offering was completed by the closing day: Hellerman had sold 45,000 shares; Koss had his 15,000 shares; and Zardus had sold some 4,000 shares on his own. Hellerman told Zardus to keep all the certificates in his office and to send stock powers to Zardus' customers. (159)

After the underwriting was completed, the President of AIS, Robert Santis, according to Hellerman's original demand that he receive 50% of the proceeds, paid to Hellerman a total of $41,000, which included an additional $10,000 requested by Hellerman who had agreed to stay in AIS in the after - market and manipulate its price. This money was paid by checks drawn on the AIS account paid to a fictitious name and certified and cashed by Murray Taylor through a discounter of commercial paper named Irving Lazarus (150-159). Hellerman received all the proceeds.

On March 9 or 10, Zardus informed Santis and Hellerman that Koss was balking, refusing to turnover his shares. Hellerman spoke to Koss and threatened to, "break his legs," if he didn't comply (153-55).

In April, while in Florida, Hellerman heard that AIS shares were being sold into the market, unaccounted for by Zardus. This meant Koss was "back-dooring." Hellerman found Koss in Florida and threatened to throw him in the pool. Koss, according to Hellerman, wanted a bigger slice of the manipulation, and an agreement was reached whereby Koss could keep 5000 shares for himself if the remainder of 8800 shares, unsold in the after-market, were sold to Hellerman as per the original deal. In the middle of April, Hellerman relieved Koss of 5000 shares, but when Koss demanded a faster transfer, Hellerman told Koss to sell an additional 3000 shares to two names, Angona and Saxon, which Hellerman would cover. A week later, Koss demanded $2.50/share and Hellerman agreed to pay that if Koss would agree to consign the shares to Hellerman for sale prior to payment. Koss agreed; the shares were consigned, and Hellerman paid Koss 7500 dollars (164-182).

In April, Levine introduced Hellerman to Herbert Shulman who agreed to run an orderly market in AIS through his firm, Dopler-Gray, which would act as middle-man between Zardus' Interstate Equity and other brokers. Shulman agreed to take his buy and sell orders from Hellerman (206-207). In May, Hellerman met Stephen Adlman and his partner Robert Kolbert

and agreed to pay Adlman $2/share for every share they bought from Interstate. Hellerman gave Adlman 2000 shares as front money, and Adlman sold them through P.J. Gruber. The check was cashed at Lazarus', and Hellerman ultimately paid Adlman about $10,000; he saw Adlman pay Kolbert. In June, 1971, in order to stall Adlman and Kolbert in their demand that they be paid monies owed them, Hellerman sent them on a ruse, a trip to Las Vegas to pick up money which wasn't there. (209-216, 234-35).

Hellerman was permitted to testify, with instructions to the jury that the testimony was to be considered against Koss only, that Koss told him that he (Koss) kept a separate set of phony books for the SEC (226).

According to Hellerman, during the months between December, 1970, and June, 1971, while Hellerman was directing this manipulation, Appellant's participation was the following:

> we had made a deal, Mr. Taylor, Mr. Layne and myself, where we would all be partners in this deal ... Mr. Layne was going to get 25% of the deal. Mr. Taylor was going to get 25% of the deal, and I was going to get 50% of the deal (140);

Hellerman paid some of the proceeds of the Santis' checks to Appellant (157); in April, Hellerman told Appellant to get friendly with Koss and find out how many shares Koss had on hand in the office (176-177); Appellant was present at the meeting when Koss demanded $2.50/share and when Koss agreed to consign 5000 shares to Hellerman (178-180); Koss agreed to Appellant as the courier for the 5000 shares (181-82);

Appellant was one of several endorsers, including Taylor, Roth, Angona, and Hellerman himself, who signed the telephone book names to stock certificates and checks (183, 188, 198); Hellerman directed Appellant and Taylor to obtain signature guarantee stamps in the names of the Manufacturers Hanover Trust and Bankers Trust Banks and Schweikart Brokerage firm (186-187); Appellant was present with Taylor when Hellerman made his arrangements with Stephen Adlman (209); in May, 1971, Hellerman told Appellant to put in an order at Pressman, Frohlich and Frost with Harold Lasoff, but the firm rejected the order (217); at Hellerman's direction, Appellant placed a wooden ticket order for AIS stock with Harris Upham in the name of Jack Lifschitz, the same name as both Appellant's father and Hellerman's tailor (220-222, 342): in June, Appellant introduced John Serbes to Hellerman and guaranteed that if Hellerman would pay Serbes for wooden tickets placed by Serbes with Oliphant, Serbes would return the money if the stock bounced (222-23); Hellerman paid Appellant a total of $6500-$7000 (226).

Hellerman further testified that the SEC first barred him from the securities business in 1960, but he immediately re-entered it as the hidden partner of a man named Kelsey whom Hellerman used as a front for the stock swindles to come. In the course of his association with Kelsey Hellerman advised him to file false statements with the SEC and advised Stephen Schoenfeld, who worked for Kelsey, to lie to the SEC (332-346). Hellerman was continually engaged

in stock swindles during this period, all involving various forms of lying and cheating (369-71, 336). He forged checks (341); he took $100,000 from his mother for use in stock swindles (350); he used his sister and brother-in-law as nominees in stock swindles (356).

Hellerman further testified that after he sold the Imperial stock deal, a shell, completely worthless stock, he was finally forced to plead guilty to a crime, the fraud in that stock manipulation, and, in addition, he pleaded to the Belmont Franchise fraud, and the At Your Service Leasing fraud. He was charged in multiple count indictments in each of these cases, but, pursuant to agreement with the government, he received a sentence of 2 years maximum jail time of which he served 9½ months. He was once again barred from the securities business for life and was required to make $100,000 restitution, having reported an income of one million dollars from some of these frauds (118-119, 354, 361-62, 369-72). After his plea in the Imperial case and his first agreement with the government, made specifically with United States Attorney Robert Morvillo, and including a promise to stop swindling, Hellerman went ahead and continued his swindles. He admitted from the witness stand in this case that he had lied to Morvillo when he made the first agreement, and that he used his relationship with Morvillo to go ahead with his other schemes, playing both sides against the middle. After that first agreement he masterminded this case; he participated in the Minute Approved Credit swindle and the Globus swindle and committed bankruptcy fraud; he

bribed the State Liquor Authority; he bribed State judges, policemen and union officials; he commited income tax evasion; he sold stolen treasury bonds, counterfeited bank checks, and bought stolen goods (361-379). He has not been indicted for these crimes, and he won't be indicted for them as long as he cooperates with the government, pursuant to a second agreement. He will serve no more than the 9½ months he has already served (121-122).

Hellerman masterminded the instant swindle, AIS, during the period following his first agreement with U.S. Attorney Morvillo. But, in May or June, 1971, he began to perceive that the AIS deal was in trouble, because all the outstanding wooden tickets were diminishing the power to buy. Hellerman testified, "so to try to protect myself I spoke to Mr. Morvillo and told him the whole story, but, I put all the blame on Murray Taylor rather than put the blame on myself." (297, 294-297).

> I already made my first agreement with Mr. Morvillo. I was a government informant and I told Mr. Morvillo that if I didn't act like I was in this deal that people would think something was wrong.
> (311-312)

Hellerman testified he was lying to Morvillo when he put the blame on Taylor and Appellant (314). He further testified that, even after telling Morvillo about AIS, and after Morvillo told him to watch it but stay out of it,

> if I could get out of more shares or make more money I would have.
> (297)

During the course of the trial, the government conceded that Murray Taylor had also informed on the AIS swindle as early as some date prior to the effective date of the underwriting (1064). On motion of defendants, the Court refused to dismiss the indictment on entrapment grounds (488,1064, 1626).

During the course of cross-examination of Mr. Hellerman, the following colloquy occurred:

MR. PANZER: Were you indicted for that [Globus swindle] ?

A: No, sir.

Q: That is part of your deal with the Government, also, right?

A: I was punished for it, but I wasn't indicted for it.

Q: When you say you were punished for it, you mean you pled guilty to the other three cases that we talked about, right?

A: The other two cases and I had to agree to testify... In the first deal I only had to plead guilty to one count and I didn't have to testify for the Government, so I was punished for all these other crimes...

THE COURT: Wait. This all evolved out of your using the word punished and he considers being forced to testify for the Government and cooperating with the Government being punished.
(374-375)

Q: Now, so far today, as of today, for everything that you have just admitted, what is the total time that you have spent in jail?

. . .

A: Nine and a half months

. . .

Q: That is your total payment for all your crimes, right?

A: No, No

MR. SORKIN: Objection as to payment

. . .

MR. PANZER: I withdraw it.

. . .

Q: That is the total prison time that you paid for all the crimes you committed?

A: Yes, sir.
(379-380)

On the basis of the above cross-examination, the Court ruled, over objection, that the defense had opened the door to prosecution redirect on Hellerman's fears for his life in giving gestimony in this case.

THE COURT: You pushed that and you pushed that and he kept saying punished and punished, punished, 'were you indicted, no, did you go to jail, no, but I have been punished for it,' and now he is going to be able to say how he was punished... He can say he was in fear of his life for having testified.
(384-385).

As a result of this ruling the prosecutor was permitted, over objection (385-388,389-409), to introduce into evidence and read to the jury a written agreement between Hellerman and the government which stated in part:

Whereas Michael Hellerman has been involved in various past criminal activities, he is now willing to

> acknowledge his criminal past and undertake to make efforts toward restitution to victims of his crime, to commit no crimes in the future and to testify truthfully before the grand jury or a trial ... Whereas Michael Hellerman is in fear of his life because of his past criminal involvement...
> (390,418).

In addition, the prosecutor was permitted, over objection (411-413), to elicit from Hellerman that he had counseled Stephen Schoengold to lie to the SEC, because, "it might kill him, and I was very scared about him getting killed and I explained it to him..." (414). The Court permitted this testimony, despite its own response in the following dialogue:

> MR. PANZER: You mean because he had a good reason there was a good reason to tell somebody to commit perjury?
>
> THE COURT: Why he did it I don't think is important.
> (410)

The prosecutor also elicited from Hellerman that part of Hellerman's understanding with the government included his prosecution for perjury and all the other crimes if he lied in any of his various testimonies (416).

Irving Lazarus, a retired discounter of commercial paper testified that he cashed various checks connected to the scheme for either Hellerman or Taylor. He did not know Appellant (518-523).

Stephen Zardus, President of Interstate Equity, testified to his role as c-underwriter for AIS. He is named as a defendant in the instant indictment and was permitted to plead guilty to one count of failure to maintain an escrow account. He was

not yet sentenced at the time of trial, but his agreement with the government was that his truthful testimonial cooperation would be made known to the Court at the time of sentence and all other charges would be dropped (528-529).

There was a meeting at the Peacock Lounge with Hellerman and Taylor, during which Taylor gave Zardus a list of names accounting for 28,000 shares of AIS and told Zardus to send them confirmations. At a second meeting the following day, Taylor gave him a second list accounting for 17,000 shares and told him not to send confirmations to those names (542-548). Zardus sent the confirmations to the first group (546). Either Taylor or Hellerman gave him the name Jack Lifschitz as one of the first group (669). A stipulation was entered into evidence that a Jack Lifschitz of Ocean Parkway would testify to being Appellant's father and to never having purchased AIS stock (683). On April 21, he attended a meeting at the Carriage House Restaurant; present were Taylor, Hellerman, and Santis; Appellant opened the door for him (567). Zardus heard Koss and Hellerman arguing, and he heard Hellerman say that everything would be all right and that Appellant would pick up 5000 shares in Brooklyn (569-570).

Robert Kolbert, a stock broker, testified he learned of AIS from Stephen Adlman, and he agreed with Adlman and Taylor to sell it for a portion of the $1.50/share the controlling group was willing to pay brokers for sales (716-720). He paid McGee and Hagler for certain sales; the money came from Adlman (722-32).

He saw Appellant and Hellerman together in the Carriage House (733).

In the first week of June, in Appellant's presence, Taylor asked him to order 1000 shares in Lifschitz's name at Ferkauf-Roggen, but Kolbert told Taylor it couldn't be done (734-736).

He flew to Las Vegas with Adlman during the third week of June to pick up a package for Hellerman; he didn't know why they were going there; they had no discussion on the plane (736, 820).

Adlman told him that the 2000 shares given as front money by Taylor or Hellerman was not sold until after the Las Vegas trip, and then only for .50/share (788).

Kolbert further testified that he was permitted to plead to the conspiracy count in the instant indictment and that in exchange for truthful testimony his cooperation would be made known to Judge Metzner. It was also understood that if he did not testify truthfully he would be indicted for perjury (712-715). The prosecutor asked Kolbert on his direct examination if Kolbert had once lied to the SEC on a matter unrelated to AIS, and Kolbert replied that he had. The prosecutor then asked,

> Am I correct that you did not tell the truth then because a defendant in this case, not here on trial... (713)

Objection to this was sustained and the Court instructed the jury to disregard it (715). On cross-examination he testified that he had lied to the SEC in the Charisma Securities case in

order to protect himself (781), and that the first time he spoke to Assistant United States Attorney Sorkin in this case, he lied to Sorkin (822). Over a standing objection (653-660, 712-15, 750-56a), the prosecutor asked the following leading questions to which he received affirmative replies:

> Am I also correct, Mr. Kolbert, that prior to the time you testified to the SEC, your life was threatened?
>
> . . .
>
> Am I correct that the reason you lied to the SEC about matters totally unrelated to Automated was because you feared that if you told the truth, your life would be in danger?
>
> . . .
> (865)
>
> The reason you lied to protect yourself was to protect yourself from physical harm, is that correct?
>
> . . .
>
> You didn't tell me the complete truth? ... Am I correct Mr. Kolbert, that a defendant named in this case, not here on trial today, but another defendant threatened you... Threatened your life in connection with your involvement and his involvement in Automated Information Systems?
>
> . . .
>
> Am I correct that the reason you lied to me initially about your involvement in Automated was because you were afraid for your life as a result of what that other defendant said to you?
> (866-867)
>
> Am I also correct, Mr. Kolbert, that you were advised by the Government and your attorney to withhold pleading guilty in this case until immediately

before trial so as not to give the other defendant not here on trial and other persons the impression that you were cooperating with the Government?
(868)

Am I correct, Mr. Kolbert, that before the arraignment, after the arraignment and up to the period of time that you pleaded guilty on April 16th, you repeatedly professed your guilt to me and to your attorney and the fact that you were going to plead guilty and cooperate and testify truthfully?
(869)

Kolbert further testified that K.C. Chapman was his customer, that he purchased stock for Chapman and that a confirmation was mailed from Ferkauf-Roggen (869-70).

Murray Levine pleaded guilty to conspiracy in another case and was awaiting sentence. He had contracted with the government to testify truthfully in all cases about which he had knowledge, in exchange for no prosecution in this case and the presentation of the fact of his cooperation to the sentencing judge. Over objection he was permitted to testify that the government told him the consequences of false testimony, an indictment for perjury and the revocation of all deals (883-885). He was involved in 6 prior stock manipulations, including Imperial with Hellerman and Taylor, none of which would be charged against him (947-950).

According to Levine, his only involvement in AIS was the introduction of Herbert Shulman from Dopler-Gray to Hellerman (895). He never guaranteed Koss' turnover of the 15,000 shares, and Hellerman never told him that any backdooring by Koss would be deducted from Levine's profits.

Levine did not buy or sell a single share of AIS (904-909). He was to get 10% of the profits for simply checking the markets and introducing brokers (927). In June, he met Santis at the Waldorf for a reason he does not remember and got a check from Santis for either $3000. or $35,000, which he knew was no good and for a purpose he can't recall, and which he kept in his personal possession for a long time for no reason, until he eventually gave it to the government (938-944).

At the end of April, Hellerman told Levine he was having trouble getting Kass to turn over the stocks and that Appellant was going to pick them up (896).

Stephen Adlman pleaded to the conspiracy count in this indictment; his cooperation would be brought to the attention of Judge Metzner. He was under State investigation for stolen securities activity and in October, 1973, had pleaded guilty to a stolen art charge in the Southern District. He understood that he would be indicted for perjury for false testimony (975-977).

He met Taylor and Hellerman in May and agreed to sell AIS to brokers for 50% of all the proceeds above a dollar/share. Kolbert came into the deal with him. The front money shares were sold for $8000. at the end of May. Two checks were received from the P.J. Gruber firm. Either a $7000. check was cashed at Lazarus in the presence of Adlman, Hellerman, Taylor and Appellant, or, "Mr. Layne sent me to collect the money which was cashed by Mr. Hellerman..." (984-988).

At the end of June, Hellerman sent Adlman to Las Vegas to get a package containing $100,000, to be used to pay Adlman money Hellerman owed him. During the entire flight to Las Vegas, Adlman discussed the package and its contents with Kolbert who accompanied him. If Kolbert said otherwise, he was lying. The package wasn't there (998-999,1051).

The week before the Las Vegas trip, Appellant asked Adlman whether a man whose name was used to order stock could be held responsible for the order if he knew nothing about it, and Adlman said he couldn't. Appellant mentioned the name Lifschitz, his father or father-in-law (999-1000).

When Adlman returned from Las Vegas, he refused an offer, "to continue having the stock bought with Mr. Layne----" (1001-02).

Thomas McGovern is the margin clerk at Harris-Upham. He identified a check dated June 16, 1971, received by him at the firm and credited to the account of Jack Lifschitz for 5000 shares of AIS at $20101.40. The check was brought to the firm by a man identifying himself as Don Saxon, the drawer of the check. Mr. McGovern did not see Don Saxon in the courtroom. The check, endorsed over to Jack Lifschitz, never cleared (1110-17).

A stipulation was entered into evidence to the effect that Murray Taylor would testify that the check came from Donald Saxon; that Taylor ordered someone to type in "paid to Harris Upham for Jack Lifschitz," that Angona signed it at Taylor's direction and that someone delivered it to the firm

at Taylor's direction (1544-45).

Albert B. Hauft, house counsel for Cunard, identified records of the cruise ship line which showed that Hellerman and Taylor were passengers on the QEII in February, 1971, each paying fares of $2500. Appellant was not a passenger on the cruise (1118-26).

Robert Philip Santis, the founder of Automated Information Systems, testified that he pleaded to the second count of the instant indictment. In return for his truthful testimony, the other counts would be dropped, and his cooperation would be made known to Judge Metzner. He would be indicted for perjury should he testify falsely (1143-44).

In mid February, he assented to the Hellerman - Levine - Taylor 50% kickback deal for the completion of the AIS underwriting. Levine did say he would ensure Koss' turnover of the 15000 shares. Just prior to the closing day, Zardus gave him checks totalling $48,500 dollars, and Santis gave Taylor checks for Hellerman totallying $41,000 (1154-57, 1172).

Appellant was present at a meeting at the Carriage House in mid-April when Hellerman and Koss agreed to the 5000 consignment and Appellant as courier (1164-61).

He identified a check which Taylor had given him as part payment for money owed him by Hellerman. When the check would not clear, Santis gave it to Levine (1176).

Don Saxon, an elderly Broadway theatrical producer, testified that in February, 1971, Hellerman tried to convince him to buy AIS. In May or June, 1971, Koss called him and

asked for his social security number because Taylor or Hellerman had bought stock in his name (1274-78, 1280).

Hellerman once suggested that he open a bank account in the Bahamas. He gave two blank checks on that account, which had no money in it, to Taylor, who promised to use the checks to obtain funds to repay Saxon for a debt owed him by Taylor. Saxon identified the Harris-Upham - Lifschitz check as one that he gave Taylor, but he didn't sign it (1280-82).

When he finally told Hellerman he would no longer go along with Hellerman's schemes, Hellerman beat him up on the street (1298).

Jackie Mason, an entertainer, testified that Hellerman told him AIS would, "go up to millions upon millions," so he bought some; Taylor suggested he buy some more. He purchased through Edwards and Hanley and identified the confirmation for that purchase. He gave Taylor a check for $5500 to purchase 1100 shares from Koss. When Mason called Koss, Koss told him no shares of AIS were purchased for him and that the check was tendered by Taylor as payment of a debt owed Koss by Taylor. Mason notified the National Association of Securities Dealers (1339-1350).

Bernard Weber, a business consultant whose client was Jackie Mason, bought AIS at Hellerman's suggestion. He identified confirmations from Edwards and Hanley (1363-1370).

Harold Zankel, employed at Ratners Restaurant, bought AIS from Stephen Hagler (1375).

Certain evidence in the case was admitted wholly, or in part, or subject to connection to others, against Theodore Koss: John McAllister, the Vice President of the First National Bank in Jersey City testified that Koss opened an account there as trustee for AIS in December, 1970, that $3000 was deposited there on December 30 and $9800 on March 5, 1971, and that a withdrawal of $12,750, payable to AIS was made on March 10, 1971 (453-58). Walter E. Lamb, Jr., a Vice President of Sheason-Hammill, testified to an approximate $3000 purchase of stock in Capital Holding Company by Koss on December 29, 1970 (465-466). Leonard Reisch bought into the original issue of AIS from Koss and mailed Koss a check. (684-696). Charles B. Gols bought shares of AIS from Koss in December, paid for the shares and on Koss' advice sold them in the last week of March (757-64). The first time Joel Macher heard of AIS was when he received a confirmation from Koss in the mail. He hadn't ordered it; he never paid for it. On Koss' advice, he went to the office, endorsed the certificates and received a sell slip in the mail (1074-79). Jack Daskalakis bought and sold AIS when Koss suggested it (1178-83). John J. Murphy found out from his accountant that he had bought and sold AIS from Koss. He never ordered it, paid for it, or received money for selling it (1234-38). Abraham Jacobs bought and sold AIS at Koss' suggestion (1267-71). John Cavallo, an examiner for the National Association of Securities Dealers received a letter of complaint about Koss from Jackie Mason (1322-24). Walter Walsh, an SEC investigator, analysed Koss' books and records concerning transactions in AIS. He

found discrepancies between the records submitted pursuant to sobpoena in 1974 and those voluntarily submitted to the SEC in 1971. He found discrepancies between Koss' AIS confirmations and the information supplied by Koss in the "blue questionnaire" submitted by Koss to the SEC and in Koss' two trading ledgers (1386-1541). Dorothy Kurts, an Assistant Manager of the Chase Manhattan Bank in Brooklyn, testified that Koss had an account there and transferred $9803 to an account at the First Jersey Bank on March 5, 1971 (1474-98). Theodore Koss himself testified before the SEC in June 1971, that the funds from his AIS underwriting went into the escrow account at First Jersey Bank, that he agreed to have Zardus become a co-underwriter, that he had no knowledge of Zardus' operations or to whom he sold, that he bought the stock back from his own customers when they wanted to get out of it, that Hellerman wanted to buy AIS, but Koss refused to sell to him, and that he had no knowledge of any connection between AIS and Taylor or Hellerman (1546-1566).

This ended the government's case. Motions to dismiss were denied, and the Court ruled that Appellant's guilt on the substantive counts, "gets in on Pinkerton" (1631). Counsel for Koss argued for dismissal, as he would later argue to the jury, on the grounds that the records of Koss' AIS sales and purchases showed that he could not have had 5000 shares of AIS on hand in mid-April when Appellant was supposed to have picked them up at Koss' office.* This motion was denied (1591-1613).

* Michael Hellerman had testified that Koss could always deliver the 15000 shares: "he had control of his customers and he could take his customers out of the stock at any time he wanted"(144).

The Court denied counsel's motion for a dismissal on grounds of entrapment (1624-26).

Appellant's defense consisted of a stipulation that if the handwriting expert were called to testify, he would say he had made an analysis of Appellant's handwriting and the check endorsements and that there was no way to conclude that any of the endorsements were Appellant's because there was no information as to their manner of execution (1883-84).

During his summation to the jury, counsel for Theodore Koss argued:

> I think that the evidence has shown that there was a conspiracy in the language of the indictment to push up the price of shares of Automated Information Systems, to sell the stock at inflated prices, and to divide the proceeds among certain people according to the evidence, namely, Michael Hellerman, Murray Taylor, Erwin Layne, at the rate of 50% for Hellerman, 25% for Taylor, 25% for Layne... there was no claim by these four main witnesses... that Mr. Koss was a partner in this enterprise
> (1944-45)

> I have not, it is true, presented a detailed analysis. As you have seen, I tried this case alone. The documentary evidence was simply overwhelming. Perhaps the fault is mine, that I did not make or simply did not have the facilities or the ability to make a detailed analysis of every transaction. Nevertheless, the fact remains that we did give all these documents to the Government. The Government has picked and chosen.
> (1980).

Later, at the sentence proceedings on June 14, 1974, counsel for Appellant moved for a new trial based on the antagonistic

and inadequate defense proferred by the attorney for Theodore Koss. This motion was denied.

> I would like to ask for a new trial for Mr. Layne based on the conduct and the representation of co-counsel, of Mr. Koss, in this case... I certainly feel that Mr. Layne's chances at this particular trial would have been a great deal greater had we not been on trial with Mr. Koss, and had not Mr. Koss' defense been conducted in the manner in which it was conducted.

On the issue of conspirator knowledge and intention, the Court charged:

> You may find that a defendant acted knowingly and wilfully if he acted voluntarily and purposely and with specific intent to do something which the law forbids... he must have acted with evil motive or bad purpose to disobey or disregard the law... (2177)
>
> . . .
>
> It is not required that each of the conspirators participate in or have knowledge of all of the conspiracy's operations ... as long as he became a member of the conspiracy with knowledge of its general scope and purposes (2179).

Appellant, Theodore Koss, and William McGee were found guilty on all counts charged against them; Stephen Hagler was acquitted on all counts (2229). Appellant was sentenced to one year imprisonment on the conspiracy count and a suspended sentence on the other counts; the Court ordered the one year sentence to begin December 1, 1974, thereby depriving him of the operation ofthe 4208 special parole provision imposed on a prior sentence he is now serving.

ARGUMENT

POINT I

THE GOVERNMENT HAS DEMEANED THE CRIMINAL PROCESS AND DEPRIVED APPELLANT OF DUE PROCESS OF LAW BY OFFERING AS ITS CHIEF WITNESS AT TRIAL, VOUCHING FOR HIS CREDIBILITY, AND ARGUING JUSTIFICATION FOR HIS PRIOR PERJURIES, THE GOVERNMENT INFORMANT WHO, WHILE UNDER CONTRACT WITH THE GOVERNMENT, MASTERMINDED THE SCHEME CHARGED AGAINST APPELLANT, USED HIS GOVERNMENT CONTRACT TO FURTHER THAT SCHEME, AND WHO ADMITTED SUBORNING PERJURY TO THE SEC, BRIBING JUDGES AND POLICEMEN, AND COMMITTING NUMEROUS STOCK SWINDLES AND INCOME TAX EVASION.

The single characteristic common to the various misdeeds of Michael Hellerman is perjury. This man's entire existence has been predicated on lies and cheats, not only with his cohorts and victims, but with State judges, policemen, the Liquor Authority, the IRS, and on at least two occasions prior to this trial, with the same United States Attorney's office who offered him to the jury in this case as a credible witness and attempted to support that offer. There must be a point at which the government's own entanglement in this man's lifetime scheme of self-preservation at the expense of truth makes a sham of the criminal process and turns the ends of justice on its ear.

We submit that that point was surpassed when in this case the government at trial resorted to the elaborate vouching process to crank up Hellerman before the jury, after the man had twice swindled the government, and after the government, with some knowledge from Hellerman and Taylor that

the AIS manipulation was proceeding, did nothing to prevent the bilking of Hellerman's victims.

The principle was established in Mesarosh v. United States, 352 U.S. 1 (1956), where the government informant's credibility was "wholly discredited by disclosures of the Solicitor General," concerning instances of perjury by the witness other than in his testimony in the case before the Court. Interests of justice and the dignity of the criminal process mandated reversal and a new trial, even though there was no direct proof of perjury in the case before the Court. This case is much worse in the quality and extent of Hellerman's wrongdoing, rendering the witness incredible as a matter of law, and any conviction thus obtained, unreliable. Not only do Hellerman's crimes of lying far outnumber the informant's in Mesarosh, but they involved direct corruption of various government agencies and officials on the State and Federal level, and they involved the very agency doing the prosecuting in this case in the very scheme charged in this case.

Hellerman testified, and the government concedes, that Hellerman had two agreements with the United States Attorney, both of which he breached and in the course of which he lied, and that he used these agreements in order to cover himself with impunity in the execution of further swindling schemes. Pursuant to the first agreement he was to give them information on past schemes and stay out of any future ones. While this first agreement was in effect, Hellerman accomplished

the Minute Approved Credit, Globus, and AIS swindles, bribed State officials, sold stolen treasury bonds, counterfeited bad checks, and beat up an elderly theatrical producer on the street; and, then, through a second agreement with the government he escaped indictment for these crimes. Throughout this period, Hellerman, while masterminding the instant AIS manipulation, fed the government the details of the manipulation, but lied about the involvement of Appellant and Murray Taylor (who also was giving the government a very early scoop on what was going on). A third agreement was then entered into between Hellerman and the United States Attorney, whose gullibility is staggering, that Hellerman would "watch" the AIS manipulation but stay out of it. Hellerman lied to them again:

> if I could get out of more shares,
> or make more money I would have (297).

This was May or June, 1971, in the middle of the after-market manipulation in AIS, and according to government concession, Murray Taylor had already been informing as early as early March, 1971, some date prior to the effective date of the underwriting (1064). There is no indication that the government did anything to stop the swindle as soon as possible to prevent further bilking of the public. Their informant was "watching" and bilking under their protective cover. Thus the government knew of the scheme while it was in progress, and their inaction furthered it. The concept of due process, "now protects the accused against pre-trial illegality by denying to the government the fruits of its exploitation of

any deliberate and unnecessary lawlessness on its part." United States v. Toscanino, 2d Cir. decided May 15, 1974, slip. op. at 3507. This is not like United States v. Corallo, 413 F. 2d 1306, 1321 (2d Cir., 1969), where the informant Itkin was, "acting wholly without the knowledge of the F.B.I. until he found it to his interest to tell the F.B.I., after the last installment of the bribe had been paid." In this case, the government had, in effect, a confession of Hellerman's involvement, and they let him go on. Thus, there is government involvement in the furtherance of the scheme charged here; there is the government as one of the many victimes of Hellerman's swindles asking the Courts, juries, and the public to trust him and send others to prison for that very scheme. This Court has retained for itself the power to prevent such a travesty of justice, and we urge that the power be exercised in this case. United States v. Toscanino, supra; United States v. Falley, (2d Cir., decided November 28, 1973, Docket No. 73-1660); United States v. Archer, 486 F. 2d 670 (2d Cir., 1973); United States v. Friedland, 441 F. 2d 855 (2d Cir., 1971); United States v. Edmons, 432 F. 2d 627 (2d Cir., 1970); Mesarosh v. United States, supra.

The government went beyond the mere offering to the jury of the testimony of the swindler who swindled them; they vouched for his credibility and attempted to create in the minds of the jury excuses, never legally cognizable, for his prior perjuries. They were permitted, over objection, to introduce one of these many agreements between them and

Hellerman, this one in writing, which stated in its own terms, in effect, that the government now believes Hellerman has put his criminal life behind him and will make $100,000 restitution on the millions he stole from others, that his lying in the past was due to fears that he would be killed, and that he understands that further perjury would result in his indictment for that crime and all the others. Thus, the jury saw a written testimonial by the government in the form of this contract and could then infer that the government would not become a party to it if they didn't believe it would be fulfilled, and the jury could infer further that since Hellerman was testifying free of any perjury indictment, he was in fact telling the truth.* This contract, empty in substance because all witnesses swear to tell the truth, was all the government could offer to rehabilitate him, since absolutely nothing else about him made him worthy of belief. The government vouched for him, put their authority behind this contract to tell the truth, and thereby implied some extra, but legally immaterial and improper, reason to accept his testimony. United States v. Grunberger, 431 F. 2d 1065, 1068 (2d Cir., 1970); Patriarca v. United States, 402 F. 2d 314 (1st Cir., 1968). Reversal is mandated, especially when without Hellerman's testimony there would be no case against Appellant, where,

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* Right at the start of their direct examination of Hellerman, the government elicited and stressed this agreement that he would testify truthfully (121-124). The jury was given no instructions on how to view these agreements.

> The prosecutor attempted to bolster the testimony of government witnesses by implying that the association of a witness with the government was a guarantee of credibility...*
> United States v. Drummond, 481 F. 2d 62, 65 (2d Cir., 1973).

The government went even further in their improper attempt at rehabilitating Hellerman, with a direct prejudicial side effect against Appellant. They were permitted to bolster his testimony by eliciting from him that his prior subornations of perjury before the SEC were somehow excusable because of fears for the life of the perjurer. They were permitted to do the same with Robert Kolbert, another coconspirator government witness who testified he also had committed perjury before the SEC in an unrelated case. In Hellerman's case, the government read the agreement which stated in part, "Whereas Michael Hellerman is in fear of his life, because of his past criminal involvement" (390, 418), and elicited on the Schoengold perjury incident, "it might kill him, and I was very scared about him getting killed and I explained it to him..."(414)**

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* In the case of Robert Kolbert, another coconspirator government witness, the prosecutor asked, "Am I correct Mr. Kolbert that before the arraignment, after the arraignment and up to the period of time that you pleaded guilty on April 16th, you repeatedly professed your guilt to me and to your attorney and the fact that you were going to plead guilty and cooperate and testify truthfully?" (869).

** No instructions were given to the jury on how to receive this testimony of Hellerman.

In Kolbert's case, a whole series of leading questions hammered home the fact that people involved in these activities would kill those who testified against them and that their prior bad acts of perjury were excusable:

> ... your life was threatened?... you feared that if you told the truth, your life would be in danger? (865) ... The reason you lied was to protect yourself from physical harm, is that correct? ... a defendant named in this case, not here on trial today, but another defendant threatened you... Threatened your life in connection with your involvement and his involvement in Automated Information Systems?... the reason you lied to me initially about your involvement in Automated was because you were afraid for your life as a result of what that other defendant said to you" (866-868).

It is clear that the impeachment of Hellerman and Kolbert using these instances of perjury unrelated to their specific testimony from the witness stand at this trial, was impeachment by prior bad acts showing a willingness to lie to officials of the government and commit the crime of perjury. Fear of physical harm is no excuse for perjury or refusal to testify, Piemonte v. United States, 367 U.S. 556 (1961),* and the government engaged itself in the inconsistent position of attempting to offer a justification for perjury which it would not recognize in prosecutions for that crime. This

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* The Court itself recognized this, but permitted the testimony anyway: "Why he did it I don't think is important" (410).

method of "rehabilitation" of a witness, "is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government." Jones v. United States, 262 U.S. 251, 263-264 (1960). This Court has not countenanced rehabilitation of the prior perjurious bad acts of a witness through the excuse of fears or threats; it has only permitted these fears to be brought out to explain inconsistencies between testimony at trial and former testimonies of the witness. United States.v. Cirillo, 468 F. 2d 1233 (2d Cir., 1972); United States v. Berger, 433 F. 2d 680 (2d Cir., 1970). Here the issue of the impeachment was not prior inconsistent statements, because the prior perjuries were on unrelated matters. The issue was prior bad acts, which in the eyes of the law do not become less onerous because the witness feared for his life. Thus, whereas an inconsistency between two statements of a witness can be "removed" by the reasons the witness had for making the first, the crime of perjury is not "removed" by the reasons offered by the government through its witness in this case, and they should not have been permitted to give the jury the impression that it was. United States v. Cirillo, supra.

In sum, the government has distorted the processes of prosecution by charging Irwin Layne with a scheme the government, by its acts of omission, had a hand in furthering, and by harboring, protecting, and bolstering the man who master-minded the scheme partly through swindling the government

itself, and by the prosecutor's further use of government authority, prosecutorial resources, and trial tactics to influence the jury to believe one of the most notorious cheaters and government corrupters of all time, all for the sake of a guilty verdict against Layne. The government should not have the advantage of this misuse of its power and we urge a reversal of the conviction.

POINT II

BECAUSE THE COURT CHARGED GENERAL KNOWLEDGE AND INTENT WERE SUFFICIENT FOR CONVICTION OF MEMBERSHIP IN A CONSPIRACY TO COMMIT MAIL FRAUD AND TO USE THE MAILS IN THE FRAUDULENT SALE AND PURCHASE OF SECURITIES, THE CONVICTION MUST BE REVERSED.

On the issue of a particular defendant's knowing and willing membership in the conspiracy, the Court charged:

> You may find that a defendant acted knowingly and wilfully if he acted voluntarily and purposely and with specific intent to do something which the law forbids... he must have acted with evil motive or bad purpose to disobey or disregard the law... (2177)... It is not required that each of the conspirators participate in or have knowledge of all the conspiracy's operations... as long as he became a member of the conspiracy with knowledge of its general scope and purposes (2179).

This charge was plain and reversable error as a matter of law, because it failed to apprise the jury that, "specific knowledge of factual circumstances conferring federal jurisdiction... is required for proof of conspiracy..." United States v. Alsondo, 486 F. 2d 1339, 1343 (2d Cir., 1973); United States v. Cangiano --- F. 2d --- (2d Cir., 1974) slip. op. 5665, 5669-70; United States V. Houle, 490 F. 2d 167

(2d Cir., 1973); United States v. Farr, 487 F. 2d 1023 (2d Cir., 1973); United States v. Crimmins, 123 F. 2d 271 (2d Cir., 1941). In this case, the factual circumstances conferring federal jurisdiction were the mailings of the confirmations charged in the indictment. The Court did not tell the jury, as it must, that they had to find that appellant had the specific knowledge that those mailings occurred and the specific intent that such mailings should occur. A general knowledge and intent to engage in securities fraud, while sufficient for conviction on the substantive crimes, is insufficient to find guilt on the conspiracy to violate those crimes (authorities cited).

The evidence against Appellant, mainly from the mouth of Hellerman, was that Appellant was Hellerman's "go-for," a lackey in the operation who simply followed Hellerman's orders and made no decisions about the direction or development of the scheme, although he may have known in general what Hellerman was doing. There was no evidence connecting Appellant to any mailings and no direct evidence that he knew of or intended any of the mailings alleged by the government to be a part of the scheme to defraud, or that use of the mails was within the scope of any knowledgeable agreement on his part to take Hellerman's orders. Thus, Appellant's conviction on the conspiracy count is based on insufficient evidence. But, if this Court should decide there was enough evidence from which the jury could find the requisite conspiratorial knowledge and intention, a reversal is nonetheless mandated because, had the jury been properly

charged, they might have found, on the evidence presented, no specific knowledge and intention to use the mails on Appellant's part.

Since Appellant was sentenced to one year imprisonment on the conspiracy count and suspended sentences on the substantive counts, a reversal on the conspiracy would reduce his period of imprisonment in this case to zero, and restore the possibility of his immediate parole under the provisions of 18 U.S.C. § 4208, granted to him under a prior sentence he is presently serving.*

POINT III

APPELLANT WAS DENIED A FAIR TRIAL WHEN HE WAS FORCED TO DEFEND AGAINST BOTH THE GOVERNMENT AND AN ACCUSING CODEFENDANT WHO WAS BEING TRIED ON A SEPARATE COUNT OF PERJURY, AND WHEN HE WAS TRIED ON AN INDICTMENT CHARGING HIM WITH BEING A "PROMOTER AND FINDER."

Prior to trial, Appellant moved for severance of his trial from that of Theodore Koss, claiming prejudice. Koss was going to be tried on two separate counts of perjury, not charged as part of the conspiracy involving Appellant. The Court originally granted this motion, because, "it is likely that the perjury counts would adversely 'rub off' on the

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* Appellant also preserves his objection to a retention of the verdicts on the substantive counts if the conspiracy count is reversed, since his responsibility on those counts may well have been predicated on the finding of guilt on the conspiracy. cf. United States v. Alsondo, supra, at 1346-47, on petition for rehearing.

remaining defendants." The Court then partially reversed itself and kept one of the perjury counts in, while severing the other. This ruling served no purpose, and the prejudice remained; the separate evidence of Koss' perjury came in nonetheless, prejudicing Appellant by association since the false statements to the SEC concerned Koss' AIS dealings and since there were no instructions to the jury to confine their consideration of the SEC testimony to Koss alone, and since Koss' defense became one of defending the truth of Koss' exculpatory SEC documents and testimony and asserting that Appellant and Hellerman were the wrongdoers in AIS. Koss' attorney argued to the jury in summation:

> I think that the evidence has shown that there was a conspiracy in the language of the indictment to push up the price of shares of Automated Information Systems, to sell the stock at inflated prices, and to divide the proceeds among certain people according to the evidence, namely, Michael Hellerman, Murray Taylor, Erwin Layne, at the rate of 50% for Hellerman, 25% for Taylor, 25% for Layne . . .
>
> (1944-45).

Thus, several prejudicial factors in this joinder militated against Appellant receiving a fair trial: (1) the prejudice from the legally unconnected, but associated subject matter of Koss' allegedly perjurious SEC testimony and documents, in a trial charging Appellant and Koss in other joint crimes (See trial Court's opinion below and cases cited therein); (2) the difference in quality and quantity between the non-conspirator testimonial and documentary evidence against

Koss, which had no relevance to Appellant's guilt (Koss' own counsel found it "overwhelming"), while only Hellerman, and, to a minor extent, some other co-conspirators gave evidence against Appellant, United States v. Donaway, 447 F. 2d 940 (9th Cir., 1971), and (3) the irreconciliable, antagonistic defenses of Appellant and Koss, which pitted them against each other, Appellant asserting Hellerman was lying totally, Koss that Hellerman was telling the truth as to Appellant and lying only as to Koss, presenting an exhibition of defense wrangling which itself would prejudice the jury to believe some part of Hellerman's testimony, cf. United States v. Gambrill, 449 F. 2d 1148, 1163 (D.C. Cir., 1971); United States v. Kozloski, 453 F. 2d 889 (9th Cir., 1971); United States v. Robinson, 432 F. 2d 1348 (D.C. Cir., 1970). F.R. Crim P. 8, 14.

At the sentence proceedings, Appellant's trial counsel offered the Court yet another prejudicial circumstance which denied Appellant a fair trial, "the conduct and the representation of co-counsel of Mr. Koss." Although counsel did not specify the instances of prejudicial conduct on the part of Koss' attorney, he was undoubtedly referring to the accusation of Appellant cited above, the attempt by Koss to show mathematically that Hellerman was lying because Koss couldn't have had 5000 shares on hand when Hellerman sent Layne to pick them up (even though there was ample evidence in the case that shares need never have left Koss' office, and that Koss' customers bought and sold at Koss' direction), and the admission by Koss' attorney in his summation that,

> The documentary evidence was simply overwhelming. Perhaps the fault is mine, that I did not make or simply did not have the facilities or the ability to make a detailed analysis of every transaction. Nevertheless the fact remains that we did give all these documents to the Government. The Government has picked and chosen. . . (1980).

This spectacle of a defense attorney announcing to the jury that the evidence submitted by his client to the government was "overwhelming," together with the same attorney's accusation that evidence in the case proved Appellant's guilt, in and of itself deprived Appellant of a fair trial on the evidence of his guilt alone. But, in addition, the separate perjury charges against Koss and the extent of the evidence against Koss, unfairly linked to Appellant by the joint trial and failure of proper instructions and the accusations of Koss' attorney further deprived Appellant of a fair trial, and the judgment should be reversed.

Appellant also preserves his objection to the prejudice created in the minds of the jury by the indictment's irrelevant and immaterial characterization of him as, "at all times material to this Indictment, a self-employed promoter and finder." The Court denied his motion to strike this surplusage and never instructed the jury to disregard it. Thus, the jury was subjected to government name-calling in the indictment, which, because it added nothing to the, "plain, concise and definite written statement of the essential facts constituting the offense charged" (F.R.Cr. P.7), (there is no crime of being a promoter), only could have the prejudicial

effect of labelling Appellant as some kind of con man worthy of conviction for that reason. United States v. Beedle, 463 F. 2d 721 (3rd Cir., 1972); United States v. Grayson, 166 F. 2d 863, 867 (2d Cir., 1948); United States v. Monroe, 164 F. 2d 471, 476 (2d Cir., 1947); United States v. Dorfman, 335 F. Supp. 675 (D.C.N.Y., 1971). This language remained in the indictment throughout the trial, and its prejudicial effect on the jury's consideration cannot be discounted.

POINT IV

APPELLANT WAS ENTITLED TO FULL DISCLOSURE OF ALL ELECTRONIC SURVEILLANCE CONDUCTED ON APPELLANT IN RELATION TO THIS CASE, THE DEFENDANTS ON TRIAL, AND THE GOVERNMENT WITNESSES.

Appellant moved prior to trial for the disclosure of electronic surveillance. In their reply memorandum, not in affidavit form, the government did not deny the existence of such surveillance, indeed, they implied its existence, but denied that,

> evidence presented to the Grand Jury was obtained from any electronic surveillance or was there any evidence presented which was obtained as a result of electronic surveillance. Furthermore, the Government will offer no evidence at trial which was obtained by electronic surveillance or was obtained as a result of electronic surveillance.

In Alderman v. United States, 394 U.S. 165 (1969), the Supreme Court held that the issue of whether or not certain overheard conversations were relevant to a given proceeding was to be determined by a full hearing and not on the basis

of in camera investigation of the Court, let alone the unsworn opinion of the United States Attorney. We submit that Appellant is entitled to full disclosure and a hearing on the electronic surveillance apparently extant in this case.

If the government should now assert that no electronic surveillance involving Appellant or his premises or telephones etc. was ever conducted, it must do so by affidavit setting forth facts evidencing a full exploration of all surveilling agencies. United States v. Smilow, 472 F. 2d 1193 (2d Cir., 1973); United States v. Alter, 482 F. 2d 1016, 1027 (9th Cir., 1973); O'Brien v. United States, 386 U.S. 345 (1967); Black v. United States, 385 U.S. 26 (1966); Benati v. United States, 355 U.S. 96, 99 (1957); United States v. Seale, 461 F. 2d 345 (7th Cir., 1972); Korman v. United States, 486 F. 2d 926 (7th Cir., 1973); In Re Grumbles, 453 F. 2d 119 (3rd Cir., 1971); In Re Tierney, 465 F. 2d 806 (5th Cir., 1972) cert. den. 410 U.S. 912 (1973). A remand would be necessary to give Appellant a chance to examine and reply to such an affidavit, with a full determination by the District Court.

Pursuant to Rule 28(i), Appellant incorporates by reference any points raised by co-appellants insofar as they are applicable to him and not inconsistent with Points made herein.

CONCLUSION

FOR THE ABOVE STATED REASONS, THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED, OR, ALTERNATIVELY, A NEW TRIAL GRANTED, OR A HEARING ORDERED ON THE MATTER OF ELECTRONIC SURVEILLANCE.

Respectfully submitted,

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